Op. Ltr. 89-02 Executive Search Report

OIP Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality.

JOHN WAIHEE
GOVERNOR

WARREN PRICE, III
ATTORNEY GENERAL

KATHLEEN A. CALLAGHAN
DIRECTOR

PH. (808) 548-8184

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
OFFICE OF INFORMATION PRACTICES
335 MERCHANT STREET, ROOM 246
HONOLULU, HAWAII 96813-2907

October 27, 1989

Carolyn Tanaka
Press Secretary
Office of the Governor
State Capitol, Fifth Floor
Honolulu, Hawaii 96813

Dear Ms. Tanaka:

Re: Executive Search Report Pertaining to Special Master for Corrections System

This is in response to your oral request of October 25, 1989 for an advisory opinion regarding whether the Office of the Governor should disclose the report prepared by an executive search firm relating to the selection of a special master for the corrections system of the State of Hawaii.

ISSUE PRESENTED

Whether a report prepared for Governor John Waihee by a private executive search firm relating to the selection of a special master for the corrections system of the State of Hawaii should be disclosed to the public pursuant to the new Uniform Information Practices Act (Modified), Haw. Rev. Stat. Chapter 92F (Supp. 1988) ("UIPA").

BRIEF ANSWER

The report is a government record which contains both public and confidential information. Under the principles of the UIPA encouraging open access to government records, we recommend the deletion of all non-disclosable information in the report and the production of the remainder of the report for public inspection and duplication.

Op. Ltr. 89-2 Executive Search Report

OIP Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality.

FACTS

Briefly stated, pursuant to Senate Resolution No. 104 (1989), the Legislature requested Governor John Waihee to appoint a special master to resolve problems within the State's corrections system. A private executive search and management consulting firm, Ford Webb Associates, was hired by the State of Hawaii to assist the Governor in the search for a special master for the state corrections system.

Ford Webb Associates conducted a nation-wide search which resulted in an August 17, 1989 report to Governor Waihee from Mr. Ted Ford Webb. The report recommended four individuals for consideration by the Governor, although the individuals had not formally applied for the position of special master.

The fifteen-page report consists of four basic parts. First, there is an introduction which highlights points of fundamental interest to the individuals recommended and areas of concern about the position to be explored with each individual. Second, Mr. Webb provides his "personal judgment of the qualities these candidates offer for this position." Third, the report contains a list of recommended interview questions. Finally, the fourth part consists of the resumes of three of the four individuals recommended for consideration. The report does not "rank" the four individuals.

The individual selected by Governor Waihee for the special master position in October 1989 was W. L. "Kip" Kautzky. Mr. Kautzky was one of the four individuals recommended by the executive search firm for the position.

A reporter for the Honolulu Star Bulletin has requested access to the Ford Webb Associates report.

DISCUSSION

The UIPA took effect on July 1, 1989. The UIPA is a new public records law which promotes open government while protecting the individual's constitutional right to privacy. Part II of the UIPA states that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1988). Notwithstanding this clear mandate for open public access to governmental information, there are exceptions to the general rule favoring disclosure.

The main exceptions to the UIPA's general rule of open disclosure are contained in § 92F-13, beginning with "...[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-14(a) clarifies that this concept of personal privacy refers only to individuals, which are defined as "natural" persons in § 92F-3.

This concept of "right to privacy" is often commonly referred to as the "balancing test" because the determination of whether a clearly unwarranted invasion of personal privacy exists requires a "balancing" of the public interest in disclosure against the privacy interests of the individual. "If the privacy interest is not 'significant', a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S. J. 689, 690 (1988).

The State Legislature has determined that an individual has a significant privacy interest in "applications, nominations, recommendations or proposals for public employment or appointments to a government position...." Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 1988). The UIPA's legislative history suggests that "[t]he case law under the Freedom of Information Act should be consulted for additional guidance" regarding an individual's privacy interest. S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S. J. 1093, 1094 (1988).

In Core v. United States Postal Service, 730 F.2d 946 (1984), the Court made a distinction between the privacy rights of successful and unsuccessful candidates for employment. Core, an employee of the United States Postal Service, had not been selected for another position as systems architect within the Service. He then requested information about the training and experience of the successful and unsuccessful applicants for the position. The Court, in balancing the privacy interests of the successful applicants against the public's interest in disclosure found that:

> In short, disclosure of information submitted by the five successful applicants would cause but a slight infringement of their privacy. In contrast, the public has an interest in the competence of people the Service employs and in its adherence to regulations governing hiring. Disclosure will promote these interests. Id. at 948.

However, with respect to the unsuccessful applicants the Court concluded that:

> [T]he balance tips the other way. Even if their names were deleted, the applications generally would provide sufficient information for interested persons to identify them with little further investigation. Though the unsuccessful applicants about whom Core requested information were deemed qualified by the officials who reviewed the files, ultimately they were rejected after interviews by the selecting official. In contrast to the lack of harm from disclosure of the applications of persons who are hired, disclosure may embarrass or harm applicants who failed to get a job. Their present employers, co-workers, and prospective employers, should they seek new work, may learn that other people were deemed better qualified for a competitive appointment.
>
> On the other side of the scale, the public interest in learning the qualifications of people who were not selected to conduct the public's business is slight. Disclosure of the qualifications of people who were not appointed is unnecessary for the public to evaluate the competence of people who were appointed. Indeed, comparison of all applications may be misleading, because the appointments were made on the basis of both the applications and interviews. Id. at 948-949 (emphasis added).

Based upon this rationale set forth in Core, we conclude that references contained in the search firm's report relating to the identity, training and experience of the successful candidate, W. L. "Kip" Kautzky, should be disclosed because the public interest in disclosure with respect to these items outweighs the individual's right to privacy. However, the public interest in the disclosure of the identities, training and experience of the unsuccessful candidates does not outweigh the significant privacy interests of those individuals and, therefore, this information should be deleted from the report before disclosure is made to the public.

The subjective narrative comments made by the search firm about each potential candidate, successful or unsuccessful, should also be deleted before disclosure of

the report to the public in order to protect the right to privacy of each individual. An analogy may be drawn to federal cases which determined that the full release of identifiable employee evaluations, favorable or unfavorable, would constitute an unwarranted invasion of the individual employee's right to privacy. Ripkis v. Dept. of Housing and Urban Development, 746 F.2d 1 (1984); Clemins v. U.S. Dept. of Treasury, Etc., 457 F. Supp. 13 (1977) (approving the deletion of identifying material in the narrative comments of the promotion appraisals). Furthermore, in this instance, the subjective narrative comments of the search firm do not contain reasonably segregable information, thereby requiring that this portion of the report be completely deleted.

There is another exception to the general rule of disclosure under the UIPA that must be examined in determining whether to release the report. Haw. Rev. Stat. § 92F-13(3) excepts from disclosure "government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function."

The release of information either about individuals recommended for positions before a final selection is made or about the unsuccessful applicants may jeopardize the integrity of the hiring process. As pointed out in Core v. United States Postal Service, supra, such disclosures may cause embarrassment or harm to an applicant in the individual's personal or business life. Qualified individuals may choose not to apply to government positions in order to avoid such risks. Therefore, the legitimate government function of hiring qualified personnel will be frustrated by a resulting chilling effect and the public will suffer. Disclosure will also have a tendency to chill candor in the recommendation process as well.

Of course, certain high level positions in government require legislative scrutiny and evaluation of the final candidate during public hearings as a part of the approval process. If there is a federal or state law requiring the disclosure of certain personal information during this process, then the information would indeed be public. Haw. Rev. Stat. § 92F-12(b)(2). However, that is not the case in the facts at hand.

CONCLUSION

The information relating to the unsuccessful candidates and the subjective comments contained in the report prepared by an executive search firm to assist the Governor in selecting a special master of corrections must be deleted in order to protect the individuals' right to privacy and to prevent the frustration of a legitimate government function pursuant to the UIPA, Haw. Rev. Stat. § 92F-13. However, the remaining portions of the report should be made available for public inspection and duplication.

Very truly yours,

Kathleen A. Callaghan

Kathleen A. Callaghan
Director

KAC:sc